Supreme Court, U.S.
FILED

091369 MAY 6 - 2010

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No. _____

In The

Supreme Court of the United States

Roberta R. Cano,

Petitioner,

v.

Timothy F. Geithner, Secretary of the United States Department of the Treasury,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eight Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Eighth Circuit reviewed the facts, circumstances, and evidence presented in the light most favorable to the petitioner?

2. Does the Per Curiam and unpublished opinion of the Eighth Circuit preclude the petitioner's case from further review?

3. Has the petitioner submitted sufficient evidence, and is some of this evidence, in fact direct evidence, thereby overcoming the prima facie requirements for establishing racial discrimination, retaliation, and hostile work environment?

4. In the event that petitioner's evidence is not direct, has the petitioner submitted sufficient facts, circumstances, and indirect evidence to establish a prima facie case of racial discrimination, retaliation, and hostile work environment resulting in constructive discharge under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.)?

5. Does the 'reassignment with significantly different responsibilities' under Burlington include the reassignment of another employee's duties in addition to the employee's regular duties?

6. Based upon the above, has the petitioner provided sufficient facts, circumstances, and evidence to overcome summary judgment and thereby warrant a trial by jury under the Seventh Amendment to the Constitution of the United States?

8. Has the petitioner received due process under the law as granted by the Fifth Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING

Petitioner is Roberta R. Cano. She is the plaintiff in the District Court and the appellant in the Court of Appeals. She brings this action on her own behalf.

Respondent is Timothy F. Geithner, Secretary of the United States Department of the Treasury, successor to Henry M. Paulson. The latter was the defendant in the District Court and the former was the appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit regarding this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (App. at 1a) is unpublished. The opinion of the District Court (App. at 6a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 2009. The Request for Rehearing En Banc and Panel Review was denied on February 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, states, in part, that it shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,

sex, or national origin. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, (et. seq.) relates to the EEOC provisions and the jurisdiction of the United States district court regarding any actions brought under this subchapter.

2. The Fifth Amendment to the Constitution of the United States provides, in part, "[no person shall] be deprived of life, liberty, or property, without due process of law".

3. The Seventh Amendment to the Constitution of the United States provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

STATEMENT OF CASE

This case presents questions regarding what constitutes sufficient facts, circumstances, and evidence to overcome summary judgment and bring this case before a jury. In addition, a question is raised whether the petitioner received due process of law under the Fifth Amendment and the right to a jury trial under the Seventh Amendment to the Constitution of the United States.

The Eighth Circuit resolved this case by finding the petitioner failed to establish a prima facie case of racial discrimination, retaliation, and hostile work environment regardless of the disputed facts, circumstances, and evidence presented. In addition, the Eighth Circuit found the petitioner's allegations failed to support her claims of constructive discharge. The Eight Circuit granted summary judgment to the respondent-appellee.

The Eight Circuit based its decision, and the underlying reasons therefore, upon the cited cases below. App. at 1a:

A. Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) and McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855, 864 (8th Cir. 2009). Plaintiff-appellant failed to meet the burden of establishing a prima

B. Turner v. Gonzales, 421 F.3d 688, 695-96 (8th Cir. 2005) and Burlington N. & Santa Fe Ry. Co. v White, 548 U.S. 53, 68 (2006). Plaintiff-appellant failed to establish a prima facie case of retaliation and failed to show a reasonable employee would have found the challenged actions materially adverse, rather than trivial harms.

C. MacGregor v. Mallinckrodt, Inc., 373 F.3d 923, 928 (8th Cir. 2004). Plaintiff-appellant's allegations do not support a constructive-discharge claim.

D. Anda v. Wickes Furniture Co., 517 F.3d 526, 531-32 (8th Cir. 2008). Plaintiff-appellant failed to establish a prima facie case of hostile work environment.

I. FACTUAL BACKGROUND

A. Plaintiff

Petitioner, Roberta R. Cano (Cano), is a former Internal Revenue Agent who had 34 years of service at the time her allegations of discrimination began. Her immediate manager, an African-American male, received a promotion and was relocating effective September 2004. His position was available temporarily until a permanent replacement was selected. This temporary position resulted in a promotion and was not competitively announced. Cano was not selected but another female with considerably less years of service, an African-American outside of Cano's workgroup, was selected. This female's manager was also African-American and he was assigned as a mentor to Cano's manager.

No one outside of Cano's workgroup, except for the female actually selected, was apprised of the temporary promotion and asked to apply. Another white female in Cano's workgroup was asked but she was due to leave the office for an extended period due to her adoption of a child.

Cano began making inquiries regarding the selection process in August 2004. Cano realized the collective bargaining agreement in effect at the time stated she (Cano) should have been selected for the promotion due to her seniority. Cano filed a formal Equal Employment Opportunity (EEO) complaint in October 2004.

The female who temporarily replaced Cano's manager had applied for the permanent manager position. She began her temporary assignment in late August and subsequently became Cano's permanent manager in late October 2004.

Prior to her permanent manager's departure, Cano was assigned the developmental position of team member on a Controlled Industry Case (CIC). Cano had never been part of a CIC team before. Cano had performed the regular duties of a field agent working regular industry cases. Cano was expected to learn the duties of team member and eventually become familiar with the duties of team coordinator. Once the team coordinator retired, Cano would take over his responsibilities. Her temporary manager received a copy of the email assigning Cano to this CIC and the expectations relative thereto at the end of August 2004.

Shortly after assuming the duties of team member, the team coordinator reassigned most of his duties to Cano. In addition, Cano was required to perform some of the functions attributable to her manager.

Cano, in essence, was expected to perform the duties of two full-time positions regardless of the fact that she was not familiar with the procedures and/or requirements. The 'team' was set deadline dates without any discussion by Cano's manager and regardless of Cano's workload, scheduled appointments, etc. Cano was expected to meet these deadlines. When Cano could not find an answer to her questions or concerns, she contacted her manager

for guidance as she had always done in the past. Cano's requests for assistance and guidance were mostly ignored by her manager. Cano had no option, therefore, but to perform the work to the best of her knowledge and ability. She submitted the task when completed. Cano's work was subsequently returned and she was required to correct and resubmit it by the mandated deadline date regardless of Cano's existing commitments or workload. Cano was also required to perform menial tasks well-below her grade level regardless of available personnel hired for these purposes. Cano found her treatment humiliating and demeaning.

During 2004 and 2005, Cano was also pursuing resolution to her EEO complaint using the administrative process available. Due to all of the above, Cano had to work numerous uncompensated hours to meet her assigned responsibilities and pursue her EEO complaint. In some instances Cano worked while she was ill in order to complete her assigned duties. She also worked at home. In March or April 2005, Cano requested relief from the Territory Manager but was rebuffed.

Throughout this same period, Cano was subjected to other actions from her manager such as the disallowance of her travel reimbursement right before she was scheduled to leave on vacation causing Cano to borrow funds. Cano's travel vouchers for the next one and one-half months were also disallowed. Cano was questioned about her leave practices, e.g., how she requested annual leave although Cano requested leave as she had always

done and as had been accepted by past managers. Cano's new manager never notified the group what practice she found acceptable as had Cano's former managers. No other group member was subjected to this treatment.

Cano was reassigned another agent's case and told she would be pulled from the developmental CIC case if she could not adequately work both of them. Cano's financial involvement with the taxpayer was questioned and Cano was eventually notified that 'it was subject to review in the future'. Cano could be removed from the CIC case if her financial dealings with the taxpayer were determined to be a 'conflict of interest' and subject to future review. After approximately six months and some abusive incidents with the team coordinator, Cano requested reassignment to another case. No action was taken by Cano's manager because "she was leaving town for training for two weeks". Cano's manager never tried to locate another case nor did she delegate this task to the person acting in her stead while she was gone. Cano's manager told her to be a 'team player' and continue working the CIC. Cano subsequently found out that her manager called the team coordinator and asked whether he was having problems with Cano's work.

The Territory Manager was aware that Cano was having problems with her manager. He unsatisfactorily resolved the travel issue with Cano so that she received her back travel reimbursements. However, her future travel reimbursement was subject to Medicaid taxes which were not

reimbursable. In addition, Cano had to wait until June of the following year for reconciliation of her travel by the Beckley Service Center and any final settlement in her favor. This settlement amounted to several hundred dollars.

In October 2005, Cano requested retirement effective upon her eligibility date. Her last physical day at work was scheduled for Friday, December 30, 2005. Cano was required to return all assigned equipment and her government ID in order to receive her pension. Cano had scheduled to take four hours of annual leave and four hours of credit hours (use or lose) on January 2, 2006. On December 30, 2005, Cano regularly updated her manager that it was taking longer to input her travel and update the case thereby leaving it as current as possible. Neither did Cano's manager inform her that she was leaving early and would be unable to complete Cano's checkout; nor did she make arrangements for another manager to complete Cano's checkout. Cano lost four credit hours for which she was not entitled to any reimbursement.

Although Cano tried to document incidents as they occurred, her physical and mental condition did not always allow her to think clearly and do so. As time passed, her situation became worse and her thinking became quite obtuse on many occasions.

Over a period of approximately sixteen months, Cano was diagnosed with numerous medical problems which included depression and anxiety. Both of these, in turn, led to sleep deprivation on a regular

basis regardless of the prescribed medications. In addition, Cano had bouts of eczema, an allergic reaction to her anxiety medication, and months of painful tendonitis in her right wrist. The tendonitis made it difficult and painful for Cano to use her computer. All of these factors made it difficult for Cano to produce an efficient and quality product as she had done in the past.

Upon Cano's retirement, her physical and mental problems were alleviated for a short while. They began manifesting once again when Cano continued her legal battle with the lower courts. This necessitated Cano's return to medication. The aforementioned description of events has taken a financial, physical, and mental toll upon both Cano and her family.

The respondent provided a dearth of information and/or evidence, other than sworn declarations which kept changing over time.

II. PROCEEDINGS BELOW

Cano filed a formal EEO complaint in October 2004 and continued to pursue her complaint through every administrative process available; all allegations in her complaint were denied.

Cano timely filed her complaint in the district court on September 13, 2006, and agreed to the assignment of magistrate judge, Frederick R. Buckles, on November 21, 2006. The respondent filed a Motion to Dismiss due to lack of jurisdiction on May 14, 2007 which Cano opposed on June 6, 2007. The district court dismissed this motion on June 13, 2007. On November 16, 2007, the respondent filed a Motion for Summary Judgment accompanied by a Memorandum in Support of Motion and Statement of Material Facts. Cano filed a response to said Motion including a Statement of Material Facts accompanied by an affidavit and documentary evidence. Both parties filed Sur-Replies to the Motion. The district court rendered its opinion. App. at 6a. The case was dismissed with prejudice on September 23, 2008. App. at 38a.

Cano timely filed her appeal which held, for numerous reasons, Cano did not meet burden. App. at 1a. The district court's decision was affirmed on November 30, 2009. App. at 4a. Cano timely requested a rehearing but this also was denied on February 9, 2010. App. at 40a.

The Eighth Circuit's position regarding the racial discrimination allegations in this case appears to

be in contradiction to the Eighth Circuit's findings in Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) wherein it held that Duffy established a prima facie case of reverse discrimination based upon alleged background circumstances. Duffy Id. cited the Supreme Court cases of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 and Texas Dep't of Community Affairs v. Burdine, 450 U. S. 248. In Duffy Id., the defendants/appellees were held to meet the burden of a nondiscriminatory reason for their selection. The burden thus shifted back to Duffy who was unable to "establish the existence of facts which if proven at trial, would permit a jury to conclude that the defendant [s'] proffered reason is pretextual and that intentional discrimination was the true reason for the defendant[s'] actions".

The McDonnell Douglas framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. Id. See Trans World Airlines, Inc. v. Thurston, 569 U. S. 111, 121. In Hishon v. King & Spalding, 467 U. S. 69, 73 the Supreme Court found that "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be provided consistent with the allegations". In Duffy Id., the Court of Appeals stated that " 'Relevant Evidence' is defined by Federal Rule of Evidence 401 to be evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence". In Duffy Id., the Eighth Circuit further stated:

"We May affirm the district court's grant of summary judgment on if, examining the evidence in the light most favorable to Duffy, the record "demonstrates 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law'. While 'summary judgment' should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case. Helfter, 115 F.3d at 615-16 (quotations and citations omitted)." The Eighth Circuit Court of Appeals also cited McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855, 864 (8th Cir. 2009) (burden-shifting). In this case, the Court stated that "Pretext may be shown with evidence that 'the employer's reason for the termination has changed substantially over time' ", (citing Loeb v. Best Buy Co., Inc., 537 F.3d 867, 873 (8th Cir. 2008).

The Eighth Circuit concluded that petitioner's claim of retaliation was "without merit, because she was not subjected to the type of materially adverse employment actions that would deter a reasonable employee from engaging in protected activity". The Court cited Turner v. Gonzales, 421 F.3d 688, 695-96 (8th Cir. 2005) and also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). In Turner , the Eighth Circuit held as follows:

"An employee's claim will survive a motion for summary judgment if the employee can produce 'direct evidence of discrimination, i.e., evidence showing a specific link between the alleged

discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action' (citing Russell v. City of Kansas City, Missouri, 414 F.3d 863, 866 (8th Cir. 2005)." Id.

The Eighth Circuit held that the petitioner's allegations do not support a constructive-discharge claim and cited MacGregor v. Mallinckrodt, Inc., 373 F.3d 923, 928 (8th Cir. 2004). In this case the Eighth Circuit stated:

"a prima facie case of discrimination requires the employee to present evidence of an adverse employment action brought on by the employer's discriminatory motive (citing Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999) (internal citation omitted). Whether there has been ad adverse action is an issue of fact for a jury to determine (citing Kim v. Nash Finch Co., 123 F.3d 1046, 1061-62 (8th Cir. 1997); Davis v. City of Sioux City, 115 F.3d 1365, 1369 (8th Cir. 1997))". Id. Furthermore, the Eighth Circuit stated:

"A constructive discharge theory of liability allows an employee to sue for discrimination even after she has voluntarily resigned. See Tidwell, 93 F.3d at 494. A constructive discharge occurs when an employee resigns after the employer has created an intolerable working environment in a deliberate attempt to compel such a resignation. See Smith v. Goodyear Tire & Rubber Co., 895 F.3d 457, 472 (8th Cir. 1990) (internal citation omitted)". Id.

The Eighth Circuit held that the petitioner's allegations do not support a hostile-work-environment claim and cited Anda v. Wickes Furniture Co., 527 F.3d 526, 531-32 (8th Cir. 2008). The Eight Circuit held the following:

"In order to establish the existence of material fact, '[a] plaintiff may not merely point to unsupported self-serving allegations' (citing Bass v. SBC Commc'ns, Inc., 418 F.3d 870, 872 (8th Cir. 2005). Instead, the plaintiff 'must substantiate [her] allegations with sufficient probative evidence that would permit a finding in [her] favor; there must be evidence on which the jury could reasonably find for the plaintiff." Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). [S]ummary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case (citing Simpson v. Des Moines Water Works, 425 F.3d 538, 542 (8th Cir. 2005) (quotation omitted)."

Regarding hostile work environment Anda, the Eighth Circuit stated as follows:

"To establish a prima facie hostile work environment claim, a plaintiff must prove: (1) that she was a member of a protected group; (2) the occurrence of unwelcome harassment; (3) a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

Regarding constructive discharge, the Eighth Circuit stated in Anda that "a plaintiff must show (1) a reasonable person in [her] situation would find the working conditions intolerable, and (2) the employer intended to force [her] to quit (citing Carpenter, 481 F.3d at 616. An employee must, however, grant [her] employer a reasonable opportunity to correct the intolerable condition before [she] terminates [her] employment (citing Turner v. Honeywell Fed. Mfg. & Techs., LLC, 336 F.3d 716, 724 (8th Cir. 2003) (quotation omitted)." Id.

Neither of the lower courts provided detail, using the specific facts of petitioner's case, and specific reasons she failed to meet her burden and be granted a trial by jury.

REASONS FOR GRANTING THE WRIT

There can be no serious doubt that the right to due process under the law presents an issue of great national importance to all citizens of the United States. This is a constitutional right. The constitution also guarantees the right to a trial by jury in civil matters where sufficient facts, circumstances, and evidence are presented.

There is pointed disagreement in the lower courts, including courts within the Eighth Circuit itself, about reviewing the facts in the light most favorable to the petitioner, applying legal precedent to establish prima facie requirements, and consideration of evidence before granting summary judgment and subsequently upon appeal.

I. THE LOWER COURTS ARE DIVIDED

The lower courts appear to take differing stances in regards to viewing the case in the light most favorable to the petitioner and consideration of the facts, circumstances, and evidence provided relative thereto.

In the case of Miller v. Hersman, 594 F.3d 8 (D.C. Cir. 2010), the male petitioner filed an EEO complaint regarding his non-selection for vacancies which were either given to females or younger applicants. He subsequently filed suit regarding retaliation and hostile work environment. The circuit court granted summary judgment against Miller who appealed. The D.C. Circuit stated, in part, "[A] plaintiff may defeat a summary judgment granted to a defendant if the parties' sworn statements are materially different" (citing Arrington v. United States, 473 F.3d 329, 337 (D.C. Cir. 2006)).

In the case of Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2d Cir. 2010), the female petitioner filed claims regarding hostile work environment, age discrimination, and retaliation for complaints of race and age discrimination and was terminated. The District Court held that the plaintiff failed to produce evidence that the reasons for her termination were false or pretextual and dismissed the petitioner's 'meager argument' that her employer did not adequately investigate the last incident as "insufficient to carry the burden of establishing pretext". The D.C. Circuit disagreed based upon its analysis of the facts and determined

the petitioner established pretext based, in part, upon the following: A. The petitioner received a negative evaluation from her manager of one week "which occurred under circumstances giving rise to a material question of pretext" and was subsequently placed on probation. She performed fine during the probation period. B. The petitioner did not act improperly by providing another employee with a list of repairs and missing fire extinguishers needed to meet FAA inspection. C. The actual investigation of this incident and the employee's complaint relative thereto "was questionable at best". D. Younger employees were treated substantially different from the petitioner. The D.C. Circuit vacated the district court's summary judgment stating, in part, "she suffered a hostile work environment, disparate treatment based on her age, and retaliation based on complaining of race, sex, and age discrimination."

In the case of Hicks v. Baines, 593 F.3d 159 (2d Cir. 2010), Hicks, et al., filed suit for retaliation. The petitioners were witnesses regarding another employee's discrimination complaint. The district court awarded summary judgment in favor of the defendants on all claims.

"The district court ruled that plaintiffs' evidence (which consisted principally of their affidavits in opposition to defendants' motions for summary judgment) was conclusory and that it did not amount to a meaningful change in the terms and conditions of employment". The plaintiffs appealed. The 2d Circuit vacated and remanded as to one of the workplace sabotage complaints and the several punitive scheduling claims.

The 2d Circuit stated that "Retaliation claims under Title VII are evaluated under a three-step burden-shifting analysis." (citing Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005 and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)). The 2d Circuit stated these requirements as follows:

"First, the plaintiff must establish a prima facie case of retaliation by showing: " ' (1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action.' "(citing Jute Id. (quoting McMenemy v. City of Rochester, 241 F.3d 279, 282-83 (2d Cir. 2001)).

The 2d Circuit further stated:

"The plaintiff's burden in this regard is 'de minimis' and the court's role in evaluating a summary judgment request is to determine only whether the proffered admissible evidence would be sufficient to permit a rational finder of fact to infer a retaliatory motive. Id. (internal quotation marks omitted)."

"Principally (though not solely) at issue in this appeal is the meaning of 'adverse employment action' in the context of the plaintiff's prima facie case of retaliation. White held that Title VII's anti-retaliation provision applies broadly to 'employer actions that would have been materially adverse to

a reasonable employee or job applicant.' 548 U.S. at 57. Actions are 'materially adverse' if they are 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. *Id.* "

"Elsewhere, the district court's opinion makes clear that it was applying pre-White law that tied retaliation to adverse action affecting the terms and conditions of employment. For example, the district court, citing pre-White cases, explained that 'only a materially adverse change in the terms and conditions of employment is actionable under a disparate treatment theory [,] ' *Id.* (internal quotation marks omitted); '[v]erbal humiliation, unfair criticism, or unfavorable schedules or work assignment do not rise to the level of adverse employment actions because they do not have a material impact on the terms and conditions of a plaintiff's employment [,] 'negative evaluations are adverse employment actions only if they affect ultimate employment decisions such as promotions, wages or termination [,] ' Id. (internal quotation marks and brackets omitted); and 'plaintiff's affidavits contain only conclusory allegations . . . none of which resulted in any meaningful change in the terms and conditions of plaintiff's employment [,] ' Id.

"The district court's error is important, because a straightforward application of White makes clear that plaintiffs' surviving workplace sabotage and punitive scheduling claims, if believed by a jury, constitute 'adverse employment actions'

for purposes of the third element of plaintiffs' prima facie case. A reasonable employee in plaintiffs' position 'may well be dissuaded' from participating in a discrimination investigation or proceeding if he knew that in retaliation, he would be disciplined (though innocent) for failing to arm a security system that is needed to protect vulnerable residents, and/or that his work schedule would be changed such that he would have to work (alone) at a facility more dangerous and threatening than the facility at which he usually worked. In so reasoning, we give effect to White's teaching that '[c]ontext matters.' 548 U.S. at 69."

In the case of Merritt v. Old Dominion Freight Line, Inc., ---F.3d--- (4th Cir. 2010), the plaintiff was a female truck driver who was fired. She sued her employer under Title VII alleging sex discrimination. The district court granted summary judgment in favor of the defendant, determining that Merritt had produced insufficient evidence to demonstrate that her employer's legitimate and non-discriminatory reason for her termination was 'pretext for discrimination'." (citing Tex. Dep't of Cmty. Affairs v.Burdine, 450 U.S. 248, 253 (1981). The 4th Circuit determined that Merritt had presented an issue of triable fact, and accordingly reversed.

The 4th Circuit stated "We review the facts under the traditional summary judgment standard, giving the benefit of inferences to the non-moving party." (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986).

In the instant case, the district court determined that Merritt failed to meet her ultimate burden under McDonnell Douglas. The court found that Merritt failed to prove pretext after her employer provided a legitimate and non-discriminatory reason for her termination. According to the district court, Merritt provided 'limited circumstantial evidence' which was not sufficient to create a genuine issue of material fact regarding her termination. This case cites the Supreme Court stating "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

The 4th Circuit held, in part, as follows:

"To be sure, we do not hold that Merritt's evidence must be believed or that, if believed, must yield an inference that Old Dominion unlawfully discriminated against her. But because Merritt's evidence may well be believed and may well yield such an inference, Old Dominion is not entitled to summary judgment. In this case, it is not any single piece of evidence but rather the evidence taken in its entirety that leads us to believe Merritt deserves a trial. Disposition of Merritt's claim at the summary judgment stage would 'intrude on the jury function by substituting our own judgment for that of the finder of fact'." Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 650 (4th Cir. 2002).

In the case of Fritz v. Charter Tp. of Comstock, 592 F.3d 718 (6th Cir. 2010), the plaintiff filed a claim of retaliation regarding for exercising her First Amendment right to freedom of speech. The 6th Circuit concluded that the plaintiff's factual allegations were sufficient to raise more than a mere possibility of unlawful First Amendment retaliation upon the part of the defendants and the district court erred in granting the motion to dismiss upon the pleadings as to that part of the complaint.

In the case of Lake v. Yellow Transportation, Inc., 596 F.3d 871 (8th Cir. 2010), the plaintiff was fired during his 30-day probation period. Lake filed suit for race discrimination. The district court granted summary judgment to Yellow and Lake appeals. The 8th Circuit reversed and remanded the case for further proceedings.

The 8th Circuit in this case cites McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) stating,

"A plaintiff alleging race discrimination may survive summary judgment either by direct evidence, or by creating an inference of discrimination under the McDonnell Douglas burden-shifting framework." Due to the fact that Lake presented no direct evidence, the 8th Circuit held that the McDonnell Douglas framework applies. The court further held as follows: "To establish a prima facie case, Lake must show (1) he is a member of a protected class, (2) he met his employer's legitimate expectations, (3) he suffered an adverse employment action, and (4) the circumstances give rise to an

inference of discrimination (for example, similarly situated employees outside the protected class were treated differently)." See Wimbley v. Cashion, 588 F.3d 959, 962 (8th Cir. 2009); Wheeler v. Aventis Pharms., 360 F.3d 853, 857 (8th Cir. 2004). The parties in this case disputed the second and fourth elements of the McDonnell Douglas burden-shifting framework. The 8th Circuit further stated "A plaintiff may show pretext, among other ways, by showing that an employer (1) failed to follow its own policies, (2) treated similarly-situated employees in a disparate manner, or (3) shifted its explanation of the employment decision." See Arnold v. Nursing & Rehab. Ctr. at Good Shepherd, LLC, 471 F.3d 843, 847 (8th Cir. 2006) and Ledbetter v. Alltel Corporate Servs., Inc., 437 F.3d 717, 722 (8th Cir. 2006) (employer failed to follow its own policies); Wimbley (employer treated similarly-situated employees in a disparate manner) Id.; Kobrin v. Univ. of Minn., 34 F.3d 698, 703-04 (8th Cir. 1994) (employer shifted its explanation of the employment decision).

The 8th Circuit concluded that the application of Yellow's policies were disputed and therefore precluded summary judgment at step three of the McDonnell Douglas analysis. The 8th Circuit also concluded because of factual disputes over Lake's attendance and availability record and whether Yellow applied its policies equally, summary judgment is inappropriate.

In the case of Campos v. City of Blue Springs, Missouri, 289 F.3d 546, 550-551 (8th Cir. 2002), Campos filed suit under Title VII alleging

constructive discharge because of her religion, race, and national origin. The charges of discrimination based upon race and national origin were eliminated. A jury found in favor of Campos on her claim of religious discrimination. The City appealed that decision and the 8th Circuit affirmed.

In this case, the 8th Circuit stated as follows:

"We apply the same standard as the district court, viewing all the facts in Campos's favor and granting her all reasonable inferences." See Riley v. Olk-Long, 282 F.3d 592, 595 (8th Cir. 2002) (citation omitted). The 8th Circuit further stated that "Judgment as a matter of law is appropriate only when all of the evidence points one way, and is susceptible of no reasonable inference sustaining the jury's verdict." Kipp v. Missouri Highway and Transp. Comm'n., 280 F.3d 893, 896 (8th Cir. 2002) (citation omitted).

The City contended that Campos failed to present sufficient evidence to establish its liability for religious discrimination by constructive discharge because she failed to prove that it deliberately created intolerable working conditions with the intention of forcing her to quit. To prove constructive discharge, Campos was required to establish that the City, and her immediate supervisor in particular, deliberately made or allowed her working conditions to become so intolerable that she had no other choice but to resign. Jones v. Fitzgerald, 285 F.3d 705, 715-16 (8th Cir. 2002) (citations omitted) or "at least [should] have reasonably foreseen [Campos']

resignation as a consequence of the unlawful working conditions [that were] created." Jackson v. Arkansas Dept. of Educ., Vocational and Technical Educ. Div., 272 F.3d 1020, 1026 (8th Cir. 2001). In addition, the 8th Circuit stated "Furthermore, Campos was required to show that a ' reasonable person, from an objective viewpoint, would find the working conditions intolerable." Id. "To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem." Id. "In other words, [a] plaintiff must take affirmative steps short of resigning that a reasonable employee would take to make her conditions of employment more tolerable." Jones, 285 F.3d at 716 (citation omitted).

The 8th Circuit agreed that Campos presented sufficient evidence to allow a jury to find that she was forced to quit because she was not a Christian. Campos presented evidence that she was subjected to months of harassment and criticism by her supervisor because she wanted a Christian in Campos's position. Campos also demonstrated that immediately before her resignation her supervisor refused to respond to her request to attend dissertation meetings, which were a prerequisite to her continued employment. Her supervisor then accused Campos of insubordination for failing to get permission. The jury also had sufficient evidence to determine that Campos's resignation was a foreseeable consequence of her supervisor's actions. See Ogden v. Wax Works, Inc., 214 F.3d 999, 1008 (8th Cir. 2000).

In the case of Roberts v. Park Nicollet Health Services, 528 F.3d 1123, 1127 (8th Cir. 2008), the plaintiff was terminated from her position. The Plaintiff filed suit alleging that her termination was motivated by her pregnancy in violation of Title VII. The district court granted summary judgment against Roberts. The 8th Circuit determined there was a genuine dispute for trial; therefore, the case was reversed and remanded for further proceedings.

The 8th Circuit in this case found that there was conflicting evidence. For purposes of summary judgment, the conflict must be resolved in the plaintiff's favor, unless the inconsistency represents only an effort by the plaintiff to manufacture a sham issue of fact. See Camfield Tires, Inc., v. Michelin Tire Corp., 719 F.2d 1361, 1365-66 (8th Cir. 1983).

In Camfield, the 8th Circuit held that the plaintiff did not create a genuine issue of material fact simply by submitting an affidavit that contradicted testimony at a prior deposition, where there were no 'legitimate reasons' for the filing of an inconsistent affidavit. The 8th Circuit further concluded that if testimony under oath ... can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment. Camfield directed that district courts should examine inconsistent submissions 'with extreme care', and limit the grant of summary judgment to cases where a conflict between deposition and affidavit presents 'only sham issues'. In conclusion, the 8th Circuit found the evidence substantial enough to create a genuine dispute for trial.

The 8th Circuit in Betz v. Cherthoff, 578 F.3d 929, 937 (8th Cir. 2009) stated the following regarding constructive discharge:

"To make out a case of constructive discharge, Ms. Betz had to show that a reasonable person would have found her working conditions intolerable, and that Mr. Cangemi intended to make her resign or, at a minimum, that her resignation was reasonably foreseeable given the conditions under which she was working (citing Reedy v.Quebecor Printing Eagle, Inc., 333 F.3d 906, 910 (8th Cir. 2003)." In addition, the court stated, in part, "she did not contend that the agency of Mr. Cangemi required her to perform duties or work hours that were in any way inhumane or unacceptable."

In Burlington, the Supreme Court stated "that a plaintiff must show a reasonable employee would have found the challenged actions materially adverse, rather than trivial harms)." Burlington further stated that "a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description." *Id.*

II. THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE

Although this case presents specific legal issues, at the most fundamental level it raises questions regarding due process of law and the right to a jury trial.

The petitioner is aware that these questions do not unilaterally apply to every case. However this petitioner, acting pro se, has seen a dearth of information made available by the 8th Circuit defining legal terms and the legal procedures required to properly pursue a case before the court.

Based upon this pro se litigant's experience, it appears that the 8th Circuit expects pro se litigants to have the resources, knowledge, and expertise of a licensed, practicing attorney. Even though the petitioner had internet access, the petitioner was not aware of the fact that she could request discovery. Therefore, she did not research this matter to request discovery. In addition, the 8th Circuit appears to be prejudiced towards pro se litigants, which has put the petitioner at a major disadvantage. For example, at the scheduling hearing the petitioner was told by the judge to "get an attorney and the court would not cut her any slack" (or something to this effect). The petitioner found this behavior unprofessional and intimidating.

Regarding the petitioner's allegation of retaliation, the district court found that the treatment she received was nothing more than petty slights.

In addition, the court concluded that because Cano continued to aggressively pursue her EEO complaints and was not dissuaded, she did not meet a prima facie case of retaliation. The petitioner finds this argument illogical to say the least. The court inferred that if the retaliation is sufficiently harmful, the complainant will not pursue (or be able to pursue) an EEO complaint. If the petitioner's interpretation of this premise is correct, no one would file a complaint of retaliation and continue to pursue it.

Based upon the record, it appears the lower courts were selective in their view of the material facts and whether the plaintiff, in fact, disputed respondent's facts. The petitioner supplied numerous documents in support of her allegations along with her affidavit. In the opinion of the petitioner, this support refuted many of the statements made by the respondents. The respondents, on the other hand, provided no documentation other than their sworn declarations.

However, the lower courts held there was no genuine issue of material facts.

The petitioner wonders, therefore, whether justice is readily and truly available to the pro se litigant and whether there is prejudice hampering said justice.

CONCLUSION

For the foregoing reasons, Roberta R. Cano respectfully requests the Court to grant per petition for certiorari.

Respectfully submitted,

Roberta R. Cano
135 St. Johns E&R Church Rd.
Leslie, Missouri 63056-1157
(573) 484-4346

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3492

Roberta R. Cano,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States District
	*	Court for the Eastern
Timothy F. Geithner,	*	Eastern District of
Secretary of the United	*	Missouri
States Department of the Treasury	*	
	*	[UNPUBLISHED]
Appellee.	*	
	*	

Submitted: November 24, 2009

Filed: November 30, 2009

Before WOLLMAN, RILEY, and SMITH, Circuit Judges.

PER CURIAM

Roberta Cano (Cano) appeals the district court's [1] adverse grant of summary judgment in this pro se Title VII complaint in which she claimed that she was denied a promotion based on reverse discrimination, and that she suffered retaliation, harassment, a hostile work environment, and constructive discharge when she complained about the promotion. For the following reasons, we affirm the grant of summary judgment. See Johnson v. Blaukat, 453 F.3d 1108, 1112 (8th Cir. 2006) (standard of review).

First, we find Cano failed to establish a prima facie case of reverse discrimination, see Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) (burden), and, regardless, Cano failed to create a *trialworthy* issue of whether her employer's legitimate nondiscriminatory reasons for promoting another employee were pretextual, see McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855, 864 (8th Cir. 2009) (burden-shifting). Second, we find Cano's retaliation claim is without merit, because she was not subjected to the type of materially adverse

1 The Honorable Frederick R. Buckles, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of [t]he parties pursuant to 28 U.S.C. § 636(c).

employment actions that would deter a reasonable employee from engaging in protected activity. See Turner v. Gonzales, 421 F.3d 688, 695-96 (8th Cir. 2005) (prima facie case of retaliation); see also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (explaining that a plaintiff must show a reasonable employee would have found the challenged actions materially adverse, rather than trivial harms). Similarly, Cano's allegations do not support a constructive-discharge claim, see MacGregor v. Mallinckrodt, Inc., 373 F.3d 923, 928 environment claim, (8th Cir. 2004) (constructive discharge), or a hostile-work-environment claim, see Anda v. Wickes Furniture Co., 517 F.3d 526, 531-32 (8th Cir. 2008) (prima facie case of hostile work environment).

We affirm.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 08-3492

Roberta R. Cano,

Plaintiff – Appellant

v.

Timothy F. Geithner, Secretary of the United States Department of the Treasury

Defendant – Appellee

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis (4:06-cv-01374-FRB)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 30, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Roberta R. Cano,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:06CV1374 FRB
	)	
Henry M. Paulson, Jr., Secretary of the United States Department of the Treasury,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Presently pending before the Court is defendant's Motion for Summary Judgment (filed November 16, 2007/Docket No. 19). All matters are pending before the undersigned United States Magistrate Judge, with consent of the parties, pursuant to 28 U.S.C. § 636(c).

Plaintiff Roberta R. Cano brings this action pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-5, et seq., alleging that her employer, the United States Department of the Treasury, unlawfully discriminated against her in

her employment on account of her race by failing to promote her and by subjecting her to harassment and retaliation for engaging in protected activity which ultimately resulted in her constructive discharge. Defendant now moves for summary judgment claiming that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Plaintiff has responded to motion, to which defendant has replied. Both parties have filed sur-replies to the motion.

Pursuant to Rule 56(c), Federal Rules of Civil Procedure, a court may grant summary judgment if the information before the court shows that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The burden of proof is on the moving party to set forth the basis of its motion, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), and the court must view all facts and inferences in the light most favorable to the non-moving party, Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). Once the moving party shows there are no material issues of fact in dispute, the burden shifts to the adverse party to set forth facts showing there is a genuine issue for trial. Id. The non-moving party may not rest upon her pleadings, but must come forward with affidavits or other admissible evidence to rebut the motion. Celotex, 477 U.S. at 324.

Summary judgment is a harsh remedy and should not be granted unless the movant "has established [its] right to judgment with such clarity

as to leave no room for controversy." New England Mutual Life Ins. Co. v. Null, 554 F.2d 896, 901 (8th Cir. 1977). The Eighth Circuit has noted, however, that "summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc., 838 F.2d 268, 273 (8th Cir. 1988).

I. EVIDENCE BEFORE THE COURT ON THE MOTION

At all times relevant to this cause, plaintiff Roberta R. Cano, a Caucasian, was employed as an Internal Revenue Agent of the Internal Revenue Service (IRS) in Chesterfield, Missouri. The instant lawsuit stems from the promotion of Joyce Addison, an African-American, to the temporary position of Acting Team Manager in August 2004. Plaintiff filed a formal EEO complaint with the Department of the Treasury on October 23, 2004, alleging that the failure to promote plaintiff to the position of Acting Team Manager constituted race discrimination, and, further, that Ms. Addison subjected her to harassment and a hostile work environment since receiving the promotion.

A. Circumstances Underlying Promotion

From September 2003 to September 2004, Antoine "Tony" Shabazz, an African-American,

was Team Manager for Team 1265 and plaintiff's first-line supervisor within that team. During Mr. Shabazz's absences, members of Team 1265 were requested to serve as "Acting Team Manager." Upon Mr. Shabazz's request, Julie Amos, a Caucasian, acted for Mr. Shabazz on several occasions during his absences. In January 2004, Mr. Shabazz asked plaintiff to serve as Acting Team Manager in his absence, but plaintiff declined due to previous obligations. In March 2004, Mr. Shabazz asked the members of his team if they were interested in becoming managers or acting as temporary managers. Only Ms. Amos expressed an interest in management. Plaintiff responded that she no longer had permanent management aspirations. On August 5, 2004, Mr. Shabazz asked plaintiff if she would be interested in serving as Acting Team Manager during his absence the following week. Plaintiff declined and suggested that he contact Ms. Amos. Upon reconsidering the offer, plaintiff contacted Mr. Shabazz and expressed her interest in the position. Mr. Shabazz, however, informed plaintiff that he had already contacted Ms. Amos and she had accepted the offer.

Mr. Shabazz accepted a position with the IRS in Indianapolis, Indiana, and was scheduled to begin in that position in September 2004. On or about August 9, 2004, Mr. Shabazz asked the plaintiff and Ms. Amos if they were interested in serving as Acting Team Manager after his departure and until a new permanent Team Manager was selected. Both expressed interest and were initially recommended for the position.

Mr. Randall, an African-American, was Team Manager of Team 1261 and was assigned to be Mr. Shabazz's mentor and management coach upon Mr. Shabazz's promotion to Team Manager in September 2003. Mr. Shabazz periodically consulted with Mr. Randall regarding management decisions and issues within his team. When Mr. Shabazz consulted with Mr. Randall about his upcoming departure and the need to recommend someone to serve as Acting Team Manager, Mr. Randall informed Mr. Shabazz that Ms. Addison, a team member of Team 1261, was interested in management and he suggested that Mr. Shabazz recommend Ms. Addison for the position.

Lori Nichols, a Caucasian, was Territory Manager for the IRS and supervised Mr. Shabazz. Due to the extended duration of the temporary position to be filled upon Mr. Shabazz's departure, Ms. Nichols requested that Mr. Shabazz recommend someone to her to become Acting Team Manager. Upon recommending possible candidates to fill the position, including Ms. Amos and the plaintiff here, Mr. Shabazz ultimately recommended that Ms. Addison be the candidate selected to serve as Acting Team Manager. Mr. Shabazz determined it would be best for the new acting to come from outside the existing team and that such arrangement would better establish managerial lines of authority within the team. Mr. Shabazz's concern in this regard arose from a previous incident whereby team members attempted to take advantage of another team member who was serving as Acting Team Manager. Ms. Nichols agreed with Mr. Shabazz's reasoning and selected Ms. Addison to be Acting Team Manager for

Team 1265. Neither Mr. Shabazz nor Ms. Nichols considered race in the recommendation or selection of Ms. Addison to serve as Acting Team Manager for Team 1265.

Ms. Addison held a college degree, a master's degree and was a Certified Public Accountant (CPA). Ms. Addison had also worked coordinated industry cases (CIC) and served as Team Coordinator for Team 1261. Plaintiff did not have a college degree, was not a CPA and was assigned her first CIC case in late-August 2004. Plaintiff had never been a Team Coordinator. Although plaintiff had not served for Mr. Shabazz as Acting Team Manager, she had acted for other managers in the past.

Beginning August 22, 2004, Ms. Nichols no longer served as Territory Manager due to her participation in the IRS's Executive Development Program. From August 23 to October 16, 2004, Lou Greer served as Acting Territory Manager. On October 17, 2004, Gregory Zielinski assumed the position as permanent Territory Manager.

On August 23, 2004, Mr. Shabazz informed his team through e-mail of Ms. Addison's selection as Acting Team Manager, Ms. Nichols' selection to participate in the Executive Development Program, and of Mr. Greer's selection to serve as Acting Territory Manager. Ms. Addison served as Acting Team Manager through late-October 2004. In late-October, Ms. Addison became the permanent Team Manager for Team 1265 and continued in that position until plaintiff retired in January 2006.

B. Conduct of Ms. Addison as Team Manager

On August 31, 2004, Mr. Shabazz assigned plaintiff to work the coordinated industry case (CIC) examination of taxpayer A. G. Edwards, Inc. This was plaintiff's first CIC examination. Coordinated industry cases are more complex and require more time and resources to complete than a standard industry case. Both plaintiff and Ms. Addison considered working a CIC examination to be helpful to plaintiff's career because it positioned her for advancement within the IRS. Rich Elbert was assigned to be Team Coordinator for this examination. Plaintiff remained assigned to this CIC case until her retirement in January 2006.

In September 2004, Ms. Addison reassigned a case from Ms. Amos to plaintiff. Ms. Amos, a member of Team 1265, was anticipated to take extended annual leave in relation to an upcoming adoption. The reassigned case was designated "priority work" and plaintiff understood that she could be removed from other assignments, including the CIC, in order to complete the reassigned case. Since plaintiff did not have to work the case, the reassignment did not affect plaintiff's workload and did not affect her assignment to the CIC examination.

On or about September 29, 2004, plaintiff submitted a financial interest disclosure form to Ms. Addison related to an individual retirement account (IRA) plaintiff owned that was managed by A. G.

Edwards, Inc., the taxpayer that was the subject of the CIC case to which plaintiff was assigned. Plaintiff disclosed the IRA's value to be between $10,000.00 and $12,000.00. IRS policy relating to financial conflicts of interest states that an employee may continue to participate in a case involving a taxpayer if the value of the employee's and his or her spouse's financial interest in the publicly traded securities of the taxpayer does not exceed $15,000.00. The investment threshold for sector mutual funds is $50,000.00. Plaintiff's IRS involved technology-sector investments. Inasmuch as a spouse's investments were imputed to the employee and plaintiff's form showed an amount nearing the conflict of interest threshold, Ms. Addison called plaintiff in October 2004 to inquire whether Roy Cano had any investments with that taxpayer. Ms. Addison was unaware that plaintiff and Roy Cano were divorced. In response to this inquiry, plaintiff clarified the nature of the account and set out her reasons to support her contention that such account did not constitute a financial interest in the client. Ms. Addison thereafter determined plaintiff's financial interest to be exempt and not to constitute a conflict of interest. Ms. Addison signed the disclosure form which allowed plaintiff to continue working on the CIC examination.

Plaintiff sought reimbursement for her September and October 2004 travel in relation to the CIC case. Plaintiff's travel vouchers were not approved because she had classified her travel status as non-taxable. Ms. Addison determined the status to be "long-term taxable travel" because the case

assignment required plaintiff to work at an alternate work site for a period reasonably expected to exceed one year.[2] The travel reimbursement of both plaintiff and Rich Elbert, the other revenue agent from Team 1265 assigned to the case, was classified by Ms. Addison as long-term taxable travel. On November 10, 2004, Ms. Addison officially determined that the A.G. Edwards case would have a duration in excess of one year. On that same date, Territory Manager Zielinski held a meeting at which Ms. Addison, plaintiff and a union representative were present. Mr. Zielinski supported Ms. Addison's classification of plaintiff's travel reimbursement status but offered a compromise, which was accepted by plaintiff. It was agreed that plaintiff's travel vouchers for September and October 2004 would be approved as non-taxable travel and that plaintiff's future travel vouchers for her work on the A.G. Edwards CIC case would be classified as long-term taxable travel. All of plaintiff's travel vouchers were approved as agreed.

In December 2004, Mr. Elbert went on annual leave. It was standard procedure for each examination team in Team 1265 to close the audit cycle of their

2 When an IRS employee's travel reimbursement status in "long-term taxable travel." taxes are withheld from the employee's travel reimbursement payments but the employee is reimbursed by the IRS for their federal, state and local income taxes withheld. Plaintiff argues that this classification nevertheless serves to her disadvantage inasmuch as withheld Medicaid taxes are not reimbursed.

cases and submit them to Ms. Addison for her review. Plaintiff therefore had the responsibility to close out the prior audit cycle of the A. G. Edwards CIC case during Mr. Elbert's absence. Because plaintiff was working her first CIC case and was unaware of any written procedures to follow, she requested assistance in closing. Without receiving assistance from Ms. Addison, plaintiff proceeded to close the cycle using industry case procedures and submitted the case on December 9, 2004, for closing. Ms. Addison thereafter informed plaintiff of additional items needed to properly complete the closure. Plaintiff completed the closing on December 14, 2004. Plaintiff was required to perform certain clerical duties, such as making copies, to complete the closing.

In March 2005, plaintiff telephoned Ms. Addison and requested she be transferred from the CIC case. Plaintiff gave no reason for her request. Ms. Addison thereafter contacted Mr. Elbert and inquired as to whether he knew of any reason why plaintiff would request to be removed. Mr. Elbert responded that he could report nothing negative in relation to plaintiff's performance on the case. At a meeting the following morning, plaintiff informed Ms. Addison that she did not want to continue working with Mr. Elbert. Ms. Addison advised plaintiff that she could not be transferred at that time because she was leaving for two weeks and there was no other case to which plaintiff could be transferred. Plaintiff does not know whether or not there was other work available but believed that a quick check of the computer system would have

determined whether such work was available. Ms. Addison did not make such a check. Plaintiff thus continued to work with Mr. Elbert until Ms. Addison returned. Subsequent to Ms. Addison's return, plaintiff and Mr. Elbert continued to work the case together. There is no evidence that plaintiff made any further complaint to Ms. Addison regarding Ms. Addison regarding Mr. Elbert or that, upon Ms. Addison's return, she continued in her request to be reassigned to another case.

During a telephone conversation with plaintiff regarding her work on the CIC case, Ms. Addison asked plaintiff to communicate via telephone when she had a significant or complicated issue, concern or question. Plaintiff preferred e-mail communication for documentation purposes. Ms. Addison did not tell plaintiff that she should not e-mail her, and, after this time, she continued to respond to e-mails that plaintiff sent to her, as well as to other communications.

When the audit plan for the next audit cycle of the A. G. Edwards CIC case was submitted to Ms. Addison by Mr. Elbert and plaintiff, Ms. Addison reviewed it and requested numerous changes. This required Mr. Elbert and plaintiff to perform additional work to incorporate these changes and improve the plan that they had submitted. Mr. Elbert assigned to plaintiff the responsibility of generating the audit plan and implementing the changes Ms. Addison requested. Plaintiff was aware of the date by which the audit plan was to be

submitted to Ms. Addison for her approval, and Ms. Addison did not request that it be completed before that date.

Plaintiff determined to retire effective January 3, 2006. Plaintiff had eight hours of "use or lose" annual leave and therefore determined to take annual leave on her last work day, January 3, 2006. Plaintiff's last scheduled day to come into work, therefore, was December 30, 2005. On December 30, 2005, plaintiff contacted Ms. Addison by telephone and said she would be a few hours late coming into the office for her pre-retirement check-out. Ms. Addison informed plaintiff that she was leaving early that day and could not wait for plaintiff to come in inasmuch as she was leaving town. Plaintiff was not aware until that time that Ms. Addison was leaving early that day. Ms. Addison asked plaintiff to come in the next business day, the effective date of her retirement, because no one else would be available to perform the checkout procedures on December 30, 2005. Plaintiff was checked out the following business day, January 3, 2006. Because of coming in to work on January 3, 2006, plaintiff "lost" four hours of annual leave.

C. Protected Activity and EEO Complaint Process

Upon learning in August 2004 that Ms. Addison had been selected to serve as Acting Team Manager, plaintiff inquired of Mr. Shabazz and Ms. Nichols as to the circumstances underlying the selection.

Thereafter, on October 23, 2004, plaintiff filed a formal EEO complaint with the Department of the Treasury alleging racial discrimination in the Department's failure to promote plaintiff to the position. In the EEO complaint, plaintiff also described various "problems" she was having with Ms. Addison, including the issue with Ms. Amos's reassigned case, the issue relating to travel reimbursement, and the issue relating to the IRA account. Plaintiff also complained that she did not receive a same-day response from Ms. Addison on a request for annual leave. Plaintiff complained that she developed stress, anxiety, depression, and chest pains due to these problems.

On December 3, 2004, the EEO informed plaintiff that it was dismissing those portions of her EEO complaint which alleged Ms. Addison subjected plaintiff to harassment and a hostile work environment. The EEO determined that such allegations failed to state an actionable claim. On that same date and by separate notice, the EEO informed plaintiff that it would investigate plaintiff's EEO claim of race discrimination in the failure to promote plaintiff to the temporary position of Acting Team Manager. No other claims were identified in this notice. Plaintiff was also informed that if no response was received to the notice, the EEO would assume that plaintiff agreed with the claim(s) as stated.

In a letter to the Department of the Treasury dated December 15, 2004, plaintiff disagreed with the EEO's dismissal of her harassment/hostile work environment claim. In response, the EEO

informed plaintiff of its continued denial of the claim for failure to state a claim. Thereafter, the EEO investigated only plaintiff's claim of race discrimination in relation to the Department of the Treasury's failure to temporarily promote plaintiff to the position of Acting Team Manager.

Throughout the EEO appeal process, plaintiff challenged the dismissal of her claim of retaliatory harassment/hostile work environment as well as continued to pursue her claim of race discrimination. On September 27, 2005, an Administrative Law Judge (ALJ) affirmed the determination of the EEO that plaintiff was not discriminated against on account of her race in relation to the temporary promotion. The ALJ also concurred with the EEO's dismissal of plaintiff's claim of harassment/hostile work environment. A Final Order on the ALJ's decision was entered on October 5, 2005. Plaintiff appealed this Final Order to the Equal Employment Opportunity Commission (EEOC) and, in her brief on appeal, alluded that she had determined to retire in January 2006 due to continued stress in relation to the EEO complaint and the subsequent retaliation. On April 6, 2006, the EEOC affirmed the agency's Final Order, finding the record not to establish that discrimination occurred. The EEOC further stated that plaintiff did not address on appeal the dismissal of her claim of harassment/hostile work environment. The EEOC did not address plaintiff's reference to her determination to retire. On June 13, 2006, the EEOC denied plaintiff's request to reconsider its decision.

Plaintiff has filed and pursued no other EEO complaints.

II. DISCUSSION

Because a review of the record shows plaintiff to have made allegations of harassment and retaliatory conduct in her EEO complaint and throughout the administrative appellate process, the undersigned determines such claims to be sufficiently exhausted for purposes of summary judgment review. Cf. Watson v. O'Neill, 365 F.3d 609, 612-14 (8th Cir. 2004) (failure to exhaust administrative remedies on claim of retaliation where in EEO complaint, plaintiff did not allege or mention *any* type of discriminatory conduct indicating retaliation or reprisal). For purposes of this summary judgment motion, the undersigned also assumes *arguendo* that plaintiff's claim of constructive discharge is sufficiently like or reasonably related to plaintiff's exhausted claim of retaliation, such that the Court may address such claim here. E. E. O. C. v. Delight Wholesale Co., 973 F.2d 664, 669 (8th Cir. 1992).

A. Race Discrimination

Plaintiff claims that the defendant's promotion of Joyce Addison instead of herself to the temporary position of Acting Team Manager in August 2004 constituted unlawful race discrimination. Defendant argues that it is entitled to summary judgment on this claim inasmuch as plaintiff cannot establish a *prima facie* case of reverse race discrimination. For the following reasons, the defendant's argument is well taken.

Title VII prohibits discrimination in federal employment on the basis of the employee's race. 42 U.S.C. § 2000e-16. An employee such as the plaintiff here who lacks direct evidence of unlawful discrimination may nevertheless establish such a claim through indirect evidence and the familiar burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Hammer v. Ashcroft, 383 F.3d 722, 724 (8th Cir. 2004). Therefore, in order to survive defendant's Motion for Summary Judgment, plaintiff must establish a *prima facie* case of discrimination. Id. If she is able to do so, the burden then shifts to defendant to produce evidence that the adverse action occurred for legitimate, nondiscriminatory reason. Id. If defendant comes forward with such evidence, plaintiff must then show that the defendant's proffered explanation is pretext for discrimination. Id. Igf defendant comes foforward with such evidence, plaintiff must then show that the defendant's proffered explanation is pretext for discrimination. Id. At all times, plaintiff bears the ultimate burden of proving that she was unlawfully discriminated against. Forrest v. Kraft Foods, Inc., 285 F.3d 688, 691 (8th Cir. 2002).

To establish a *prima facie* case on a claim of reverse race discrimination, plaintiff bears the burden of demonstrating: 1) that she is white; 2) that she applied for and was qualified for an open position; 3) that the employer hired someone of a minority race; and 4) that background circumstances support the suspicion that the defendant is that

unusual employer who discriminates against the majority. Hammer, 383 F.3d at 724. Defendant concedes that plaintiff has met the first three elements of a *prima facie* case. Defendant argues, however, that plaintiff has failed to establish that the defendant is that unusual employer who discriminates against the majority.

Plaintiff has presented the Court with no evidence of background circumstances to support the suspicion that the defendant discriminated against the majority. The undisputed evidence before the Court shows that Ms. Addison was substantially more qualified for the position than plaintiff and indeed possessed a superior educational background and an active interest in attaining a management position. The undisputed evidence also shows that plaintiff and another Caucasian colleague were initially solicited and recommended for the position, but that the determination was made to promote someone outside of the team in order to better establish the managerial lines of authority. This concern regarding the lines of authority came in response to a previous incident whereby team members attempted to take advantage of another team member who was serving as Acting Team Manager. In addition, plaintiff herself had previously indicated to the Team Manager that she had no interest in pursuing management opportunities and indeed, one week prior to being considered for this promotion, rejected an offer to serve as Acting Team Manager for a limited period of time. Cf. Duffy v. Wolle, 123 F.3d 1026, (8th Cir. 1997) (plaintiff met this element of *prima facie* case

by establishing that person hired was substantially less qualified than plaintiff; that an interest in hiring members of a minority class had been expressed by the administration; and that some members of the panel usually hired members of the minority class).

In light of this strong objective evidence to support the defendant's determination to temporarily promote Ms. Addison to the position of Acting Team Manager of Team 1265, the fact that Mr. Shabazz, who made the final recommendation to promote Ms. Addison, and Mr. Randall, who recommended Ms. Addison to Mr. Shabazz, were both African-American, is insufficient alone to establish that the defendant is that unusual employer who discriminates against the majority. This is especially true here where it has been shown that members of plaintiff's race had previously served as Acting Team Manager at the request of Mr. Shabazz and that, indeed, plaintiff herself had been asked by Mr. Shabazz in the past to serve.

Because plaintiff cannot establish a *prima facie* case of reverse race discrimination in the defendant's failure to promote her in August 2004 to the temporary position of Acting Team Manager, defendant is entitled to summary judgment on plaintiff's claim.

B. Retaliation

Plaintiff claims that Ms. Addison's employment actions taken against her were in retaliation for engaging in protected activity, that

is, for questioning Ms. Addison's promotion to the temporary position of Acting Team Manager and for subsequently pursuing agency action regarding race discrimination and harassment.

Title VII prohibits employers from retaliating against employees for opposing any discrimination made unlawful by Title VII, or for making a charge or participating in any manner in an investigation or proceeding under Title VII. 42 U.S.C. § 2000-3(a); Bogren v. Minnesota, 236 F.3d 399, 407-08 (8th Cir. 2000); Brower v. Runyon, 178 F.3d 1002, 1005 (8th Cir. 1999). For claims of retaliation where direct evidence is unavailable, the McDonnell-Douglas burden-shifting analysis applies. Twymon v. Wells Fargo & Co., 462 F.3d 925, 936 (8th Cir. 2006). As such, plaintiff bears the burden of establishing a *prima facie* case that she was retaliation. Higgins v. Gonzales, 481 F.3d 578, 589 (8th Cir. 2007). To establish a prima facie case that she was retaliated against for complaining of discriminatory conduct, plaintiff must show that: 1) she engaged in activity protected by Title VII; 2) a reasonable employee would have found the challenged retaliatory action materially adverse; and 3) a causal connection exists between her protected activity and the adverse employment action. Id. If plaintiff establishes per *prima facie* case of retaliation, the burden shifts to the defendant-employer to produce some legitimate, non-discriminatory reason for the adverse action. Buettner v. Arch Coal Sales Co., Inc., 216 F. 3d 707, 714 (8th Cir. 2000). If the employer satisfies this burden, the plaintiff then must demonstrate that the proffered reason is pretext for retaliation. Id.

The ultimate burden rests with the plaintiff to establish that her employer's adverse action was in retaliation for plaintiff's protected conduct. Id.

The evidence before the Court shows plaintiff to have engaged in protected activity. However, the evidence fails to establish that a reasonable employee would find the defendant's alleged retaliatory actions to be materially adverse. In Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), the Supreme Court recognized that the anti-retaliation provision of Title VII "is not limited to discriminatory actions that affect the terms and conditions of employment" because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." Id. 63-64. The Court held that "a plaintiff [alleging retaliation' must show that a reasonable employee would have found the challenged action materially adverse [.]" Id. at 68. The adversity must be *material* so as to separate significant from trivial harms. Burlington N., 548 U.S. at 68. Petty slights, minor annoyances, personality conflicts, and snubbing by supervisors do not create such significant harms. Id.; see also Higgins, 481 F.3d at 389-90. Instead, the anti-retaliation provision of Title VII seeks to prevent employer interference with unfettered access to the Title VII remedial mechanisms by "prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." Burlington N., 548 U.S. at 68 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

In deciding whether an action would be adverse to a "reasonable employee," this Court must consider the specific context of the action. Id. at 69.

In this cause, plaintiff claims that Ms. Addison's conduct as set out above, and specifically, the reassignment of Ms. Amos's case in September 2004, the initial disapproval of travel reimbursement, the October 2004 inquiry regarding plaintiff's IRA, the failure to initially assist plaintiff in closing out the prior audit cycle in December 2004, the failure to reassign plaintiff from the CIC case in March 2005, the request for plaintiff to communicate with her via telephone, the last-hour request to make changes to the CIC's final audit, and the failure to make arrangements for the plaintiff to check out on December 30, 2005, was in retaliation for plaintiff's earlier inquiries regarding Ms. Addison's promotion and for filing an EEO complaint of discrimination. Plaintiff's allegations, however, point to nothing more than petty annoyances, minor inconveniences and supervisor "snubbing."

The undisputed evidence shows that despite being requested to assume responsibility for Ms. Amos's case in September 2004, plaintiff in fact performed no work on the case inasmuch as Ms. Amos did not take annual leave as expected. As such, plaintiff's assignment to and performance on the CIC case, which both plaintiff and Ms. Addison considered to be desirable and professionally beneficial to plaintiff, were not affected by this proposed reassignment. Nor did Ms. Addison's query to plaintiff regarding her IRA affect plaintiff's CIC

assignment inasmuch as, through her questions to plaintiff and plaintiff's subsequent clarification, Ms. Addison was able to find no conflict of interest in plaintiff's assignment and was therefore able to approve plaintiff's continued participation on the case. Likewise, Ms. Addison's failure in December 2004 to initially assist plaintiff in closing prior audits and her last-hour requests for changes to the CIC final report did not affect plaintiff's performance on the CIC case. Although plaintiff was inconvenienced by Ms. Addison's actions and experienced pressure to timely complete the projects, nothing before the Court shows plaintiff not to have been able to timely perform what was requested and in a satisfactory manner. Additional stress experienced as a result of increased demands does not constitute adverse action sufficient to trigger the protections of Title VII. See Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994).

With respect to plaintiff's request for travel reimbursement, the undisputed evidence before the Court shows plaintiff and Ms. Addison to have merely had differing views as to the proper classification of plaintiff's travel. Upon meeting with the Territory Manager, it was determined that Ms. Addison's interpretation of the travel classification was correct but that plaintiff would be granted travel reimbursement as she requested for the first two months of the travel period. With respect to the failure of Ms. Addison to reassign plaintiff from the CIC case in March 2005 upon plaintiff's request, plaintiff admits that her request for reassignment was on account of a personality

conflict with her Team Coordinator on the project. Other than plaintiff's unsupported assertion that Ms. Addison could have found another case if she had looked, plaintiff has presented no evidence to rebut the defendant's showing that at the time of plaintiff's request, Ms. Addison had no other case to assign to plaintiff and that Ms. Addison could not accede to plaintiff's request for two weeks inasmuch as Ms. Addison would be out of town. To withstand summary judgment, plaintiff must substantiate her allegations with " 'sufficient probative evidence [that] would permit a finding in [her] favor on more than mere speculation, conjecture, or fantasy.' " Moody v. St. Charles County, 23 F.3d 1410, 1412(8th Cir. 1994) (quoting Gregory v. Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992)). Nevertheless, plaintiff has presented nothing to the Court to demonstrate that as a result of Ms. Addison's failure to reassign plaintiff, she suffered a significant harm. Indeed, as discussed above, the evidence shows that plaintiff was able to continue work with her Team Coordinator and to have timely and satisfactorily completed the CIC project.

Finally, the request for plaintiff to communicate by telephone and to come in on her last day of work to undergo pre-retirement check out procedures amount to nothing more than mere inconveniences to plaintiff.

The record reflects that plaintiff had a personality conflict with Ms. Addison and disagreed with Ms. Addison's management style and level of oversight. Plaintiff has not alleged, however, nor

does the record demonstrate that such personality conflict and professional disagreement created a situation so unbearable or bleak such that a reasonable employee would have been dissuaded from complaining about discrimination in such an environment.[3] Indeed throughout the entire period during which Ms. Addison served as plaintiff's Team Manager, acting or otherwise, plaintiff remained assigned to a desirable position and was able to timely and satisfactorily complete the projects which were assigned to her in that position. Because personality conflicts, minor inconveniences and snubs do not constitute significant harm in the circumstances of this case, it cannot be said that Ms. Addison's actions materially and adversely affected plaintiff such that a reasonable employee in her shoes would be dissuaded from complaining. See Higgins, 481 F.3d at 591.

Accordingly, because plaintiff has failed to establish a *prima facie* case, defendant is entitled to summary judgment on plaintiff's claim of retaliatory harassment.

C. Constructive Discharge

Finally, plaintiff claims that she determined to retire two years earlier than planned due to the stresses experienced in her employment caused

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3 To the contrary, as set out above, the record shows plaintiff to have continued during this time to actively pursue her claim of discrimination, including aggressive appeals of the EEO's adverse findings.

by her employer's retaliation. Circumstances amounting to constructive discharge are considered to be adverse employment actions. Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999). A constructive discharge occurs when an employer deliberately renders the employee's working conditions so intolerable that the employee has no option but to quit. Devin v. Schwan's Home Serv., Inc., 491 F.3d 778, 789 (8th Cir. 2007); Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir. 1999). "[T]he employer must deliberately create intolerable working conditions with the intention of forcing the employee to quit and the employee must quit." Breeding, 164 F.3d at 1159 (internal quotation marks and citation omitted). "The conduct complained of must have been severe or pervasive enough to create an objectively hostile or abusive work environment, and additionally the plaintiff must subjectively perceive the environment to be abusive." Devin, 491 F.3d at 789 (internal quotation marks and citation omitted). "A constructive discharge arises only when a reasonable person would find her working conditions intolerable. 'An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.' " Vajdl v. Mesabi Academy of KidsPeace, Inc., 484 F.3d 546, 553 (8th Cir. 2007) (quoting West v. Marion Merrell Dow, Inc., 54 F.3d 493, 497 (8th Cir. 1995)).

As discussed supra at Section II.B, the alleged hostile conduct which plaintiff claims she was subjected to was neither severe nor pervasive enough to support her claim of constructive discharge.

Plaintiff complained of isolated professional disagreements and personality conflicts which occurred in September, October, December 2004. After the March 2005 incident wherein plaintiff was not reassigned from the CIC case and thereafter satisfactorily completed the project, plaintiff alleges no hostile conduct prior to December 30, 2005, the last business day before her effective retirement date. See Devin, 491 F.3d at 790 (plaintiff not constructively discharged where alleged hostile conduct was sporadic); Elnashar v. Speedway SuperAmerica, L.L.C., 484 F.3d 1046, 1058 (8th Cir. 2007) (plaintiff not constructively discharged where the record showed only that he felt unfairly criticized and his encounters with his supervisor were unpleasant); Jones v. Fitzgerald, 285 F.3d 705, 716 (8th Cir. 2002) ("Constructive discharge requires considerable more proof than an unpleasant and unprofessional environment."); Breeding, 164 F. 3d at 1160 (feeling of being unfairly criticized, or difficult or unpleasant working conditions not so intolerable as to compel a reasonable person to resign).

Nor has plaintiff demonstrated that she took affirmative steps short of early retirement that a reasonable employee would have taken to make her conditions of employment more tolerable. Jones, 285 F.3d at 716. Indeed, the evidence before the Court shows that in November 2004, plaintiff met with her Territory Manager in an effort to resolve her dispute with Ms. Addison regarding travel reimbursement and that the resolution of such circumstance was partially beneficial to plaintiff. There is no evidence

before the Court showing that plaintiff made any other effort with either Ms. Addison or any of her superiors to resolve any other perceived conflict plaintiff had with Ms. Addison. Nor is there any evidence before the Court demonstrating that any such effort would have been futile. See id.

In as much as the undisputed evidence before the Court shows that the conditions of plaintiff's employment were not so intolerable that a reasonable person would be forced to retire early or that defendant acted with the requisite intention of forcing plaintiff into early retirement, defendant should be granted summary judgment as to plaintiff's claim of constructive discharge.

Therefore, for all of the foregoing reasons,

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment (Docket No. 19) is granted.

IT IS FURTHER ORDERED that defendant's Motion to Strike (Docket No. 32) is denied.

Judgment shall be entered accordingly.

/s/ Frederick R. Buckles

UNITED STATES MAGISTRATE JUDGE

Dated this 23rd day of September, 2008.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Roberta R. Cano,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:06CV1374 FRB
	)	
Henry M. Paulson, Jr., Secretary of the United States Department of the Treasury,	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the Memorandum and Order entered herewith,

IT IS HEREBY ORDERED AND ADJUDGED that defendant Henry M. Paulson, Jr., Secretary of the United States Department of the Treasury, shall have judgment against plaintiff Roberta R. Cano on plaintiff's claims of race discrimination, retaliatory harassment, and constructive discharge raised in plaintiff's

Complaint; and plaintiff's Complaint is hereby dismissed with prejudice.

/s/ Frederick R. Buckles

UNITED STATES MAGISTRATE JUDGE

Dated this 23rd day of September, 2008.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3492

Roberta R. Cano,

Plaintiff – Appellant

v.

Timothy F. Geithner, Secretary of the United States Department of the Treasury

Defendant – Appellee

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis (4:06-cv-01374-FRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Gruender took no part in the consideration or decision of this matter.

February 9, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3492

Roberta R. Cano,

Plaintiff – Appellant

v.

Timothy F. Geithner, Secretary of the United States Department of the Treasury

Defendant – Appellee

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis (4:06-cv-01374-FRB)

MANDATE

In accordance with the opinion and judgment of 11/30/2009, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

February 17, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans